Chang Yun Tai & Ors v Dataran Mantin Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D22–1498 OF 2005
ABDUL AZIZ ABDUL RAHIM J
9 NOVEMBER 2009

Banking — Banker and customer — Loan facility for purchase of property — Rescission, of — Whether borrower may rescind loan agreement due to unlawfulness of sale and purchase agreement — Whether banker to be concerned with propriety or legality of contract between developer and borrower — Endorsement of development project by banker — Whether banker liable for complicity in purported conspiracy by developer to injure borrower

Civil Procedure — Action — Capacity to sue — Borrower executing absolute assignment over property in favour of financier for loan — Whether borrower prohibited from instituting civil action without assignee's consent — Law in Philleoallied Bank (M) Bhd and Nouvau Mont Dor (M) Sdn Bhd changed by s 22C of Housing Development (Control & Licensing) Act 1966 — Whether assignee's consent required

Civil Procedure — Striking out — Rules of the High Court 1980 O 18 r 19 — Application for declaration that sale and purchase agreement void due to fraudulent representation by developer — Application for declaration that loan financial agreements are void due to illegality of underlying sale and purchase agreements — Whether reasonable cause of action shown — Whether claim scandalous, vexatious or an abuse of process of court — Fact that case is weak and unlikely to succeed not a ground to strike out — Whether triable issues shown

Contract — Assignment — Absolute assignment — Borrower executing absolute assignment over property in favour of financier for loan — Whether borrower prohibited from instituting civil action without assignee's consent — Law in Philleoallied Bank (M) Bhd and Nouvau Mont Dor (M) Sdn Bhd changed by s 22C of Housing Development (Control & Licensing) Act 1966 — Whether assignee's consent required

All 178 plaintiffs alleged they were defrauded by the first to sixth defendants. It was alleged that the plaintiffs were induced, through fraudulent representations made by first defendant and other associated companies of the first defendant, to purchase apartments ('properties') in a project developed by

the first defendant. The representation alleged by the plaintiffs was that the properties would generate guaranteed returns of 8%pa for a period of 15 years derived from rentals from immediate student population once the project was completed. The purchase of the properties were financed by certain financial institutions and the plaintiffs alleged that these financial institutions had allowed themselves to be represented as endorsing the project. The properties were developed on land belonging to the seventh defendant who was the local authority under a power of attorney given by the seventh defendant to the first defendant. The plaintiffs contended, inter alia: (i) that the power of attorney did not comply with the requirements of the Power of Attorney Act 1949 and that the granting of the power of attorney was ultra vires the powers of the seventh defendant under the Local Government Act 1976; (ii) that the guarantee returns scheme devised by the first defendant and managed by the fourth defendant was an investment contract within the meaning of s 84 of the Companies Act 1965 ('the Act') and as such, the first defendant's failure to comply with Part IV Division 5 of the Act rendered the guarantee returns scheme illegal; (iii) that since the guarantee returns scheme was a collateral contract to the sale and purchase agreements ('SPAs'), the SPAs were illegal and/or void under s 24(b) and s 65 of the Contracts Act 1950; and (iv) that if a financier provides finance for illegal businesses, the financier is aiding and abetting the wrong doing. The plaintiffs claimed that since the SPAs and the associated guarantee returns scheme were void, the financing agreements were also void and unenforceable. Various striking out applications were filed by the defendants.

Held, allowing applications in part:

(1) It is settled law that a weak and unlikely to succeed case is not a ground to strike out. If the plaintiffs can show some cause of action or some question fit for further investigation at the trial then the striking out should be refused (see para 9).

(2) The state of the law as stated in *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 and *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 have changed due to the amendment to the Housing Development (Control and Licensing) Act 1966. Under the new s 22C, a homebuyer shall be entitled on his own volition and his own name to commence and maintain any action in respect of any matter arising out of the SPA notwithstanding the assignment. The plaintiffs could avail themselves the benefits of s 22C and therefore had the locus to commence the action against the second and sixth defendants (see paras 15–16).

(3) The issue as to the legality of the agreements was definitely an issue to be tried. The issue whether the guarantee returns scheme was a collateral contract to the SPAs and whether it was represented as an inducement to

the plaintiffs to enter into the SPAs were also triable issues. The issue as to whether the seventh defendant had the authority to make the power of attorney in favour of the first defendant was also a triable issue (see paras 17, 24 & 26).

(4) The relationship between the plaintiffs and the banks is purely commercial in nature strictly on a *quid pro quo* basis that the monies are lent to be repaid in accordance with the terms and conditions of the loans agreements. The banks as loan provider should not be concerned with the propriety or legality of any contracts entered into between the developer, or any other persons (see para 41).

(5) The ninth, tenth, 11th, 13th and 15th defendants (bankers) were not privy to the SPAs and the guarantee returns scheme agreements. The SPAs were completed and the monies under the loan agreements were disbursed to the first defendant. Since the plaintiffs were now trying to rescind the contracts with the banks and were seeking an equitable remedy, the plaintiffs themselves had to do equity by returning the benefits received under the loan agreements. The plaintiffs had not shown this in their affidavits or pleadings. Therefore, the plaintiffs' claim against these defendants was obviously unsustainable and an abuse of the court process (see paras 40 & 42).

(6) The 20th defendant provided financing only to three of the 178 plaintiffs. The rest of the plaintiffs had no dealing with 20th defendant and the 20th defendant had not endorsed the project. Therefore the plaintiffs had no reasonable cause of action against the 20th defendant. Just because the 20th defendant had filed a counterclaim seeking declaratory relief did not give the plaintiffs a cause of action against the 20th defendant (see para 44).

(7) There were several end financiers for the project but not all of them endorsed the project. The plaintiffs' arguments that endorsing banks were agents or in collusion with the first to sixth in a conspiracy to injure the plaintiffs could not be true. The endorsement of the project by the endorsing banks does not make the banks a complicity in the purported conspiracy to injure the plaintiffs (see para 47).

[Bahasa Malaysia summary

Kesemua 178 plaintif-plaintif ditipu oleh defendan-defendan pertama hingga keenam. Didakwa bahawa plaintif-plaintif didorong, melalui pernyataan-pernyataan fraud yang dilakukan oleh defendan pertama dan lain-lain syarikat-syarikat bersekutu defendan pertama, untuk membeli pangsapuri-pangsapuri ('hartanah-hartanah') dalam projek yang dibangunkan oleh defendan pertama. Perwakilan yang didakwa plaintif-plaintif ialah bahawa hartanah-hartanah tersebut akan menjana pulangan yang dijamin sebanyak 8% setahun selama tempoh 15 tahun daripada sewaan di kalangan

populasi pelajar-pelajar yang sedia ada apabila projek tersebut siap. Pembelian hartanah-hartanah tersebut dibiayai oleh beberapa institusi-institusi kewangan dan plaintif-plaintif mendakwa bahawa institusi-institusi kewangan tersebut membenarkan representasi bagi pihak mereka untuk pengendorsan terhadap projek tersebut. Hartanah-hartanah tersebut dibangunkan di atas tanah kepunyaan defendan ketujuh yang merupakan pihak berkuasa tempatan melalui kuasa wakil yang diberikan oleh defendan ketujuh kepada defendan pertama. Plaintif-plaintif berhujah, antara lain: (i) bahawa kuasa wakil tersebut tidak mematuhi peruntukan-peruntukan Akta Surat Kuasa Wakil 1949 dan bahawa pemberian kuasa wakil tersebut ultra vires kuasa-kuasa defendan ketujuh di bawah Akta Kerajaan Tempatan 1976; (ii) bahawa skim jaminan pulangan yang direka oleh defendan pertama dan diuruskan oleh defendan keempat merupakan kontrak pelaburan dalam maksud s 84 Akta Syarikat 1965 ('Akta') dan oleh itu, kegagalan defendan pertama mematuhi Bahagian IV Divisyen 5 Akta menjadikan skim jaminan pulangan tidak sah; (iii) bahawa memandangkan skim jaminan pulangan tersebut merupakan kontrak kolateral kepada perjanjian-perjanjian jual beli ('PPJB'), PPJB tersebut tidak sah dan/atau terbatal di bawah s 24(b) dan s 65 Akta Kontrak 1950; dan (iv) bahawa jika pembiaya memberikan kemudahan kewangan untuk perniagaan yang tidak sah, pembiaya tersebut membantu dan bersubahat perbuatan salah tersebut. Plaintif-plaintif mendakwa bahawa disebabkan PPJB dan skim jaminan pulangan yang berkaitan terbatal, perjanjian-perjanjian pembiayaan itu juga terbatal dan tak boleh laksana. Beberapa permohonan pembatalan juga difailkan oleh defendan-defendan.

Diputuskan, membenarkan sebahagian permohonan:

(1) Menjadi undang-undang tetap bahawa kes yang lemah dan tak mungkin akan menang bukanlah alasan untuk pembatalan. Jika plaintif-plaintif boleh menunjukkan apa jua kausa tindakan atau persoalan yang menjurus kepada siasatan selanjutnya semasa pendengaran, pembatalan tidak harus dibenarkan (lihat perenggan 9).

(2) Kedudukan undang-undang seperti yang dinyatakan dalam kes *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 dan *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 telah berubah disebabkan pindaan kepada Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966. Di bawah s 22C yang baru, pembeli rumah berhak atas kerelaan dan namanya sendiri untuk memulakan dan menyenggarakan apa-apa tindakan berkaitan apa-apa perkara yang berbangkit daripada PJB tanpa mengambilkira penyerahhakan. Plaintif-plaintif boleh menggunakan faedah-faedah s 22C untuk membantu diri mereka sendiri, maka mereka mempunyai locus untuk memulakan tindakan terhadap defendan-defendan kedua dan keenam (lihat perenggan 15–16).

(3) Isu tentang kesahan perjanjian-perjanjian tersebut semestinya merupakan isu yang boleh dibicarakan. Isu sama ada skim jaminan pulangan merupakan kontrak kolateral kepada PPJB dan sama ada isu tersebut digambarkan sebagai dorongan kepada plaintif-plaintif untuk mendatangani PPJB tersebut juga merupakan isu-isu yang boleh dibicarakan. Isu sama ada defendan ketujuh mempunyai kuasa untuk memberikan kuasa wakil kepada defendan pertama juga merupakan isu yang boleh dibicarakan (lihat perenggan 17, 24 & 26).

(4) Hubungan antara plaintif-plaintif dan bank-bank bersifat komersial semata-mata berdasarkan *quid pro quo* bahawa wang tersebut dipinjamkan untuk dibayar balik berikutan terma-terma dan syarat-syarat perjanjian-perjanjian pinjaman-pinjaman itu. Bank-bank tersebut sebagai pemberi pinjaman tidak harus risau dengan kesesuaian atau kesahan apa-apa kontrak yang ditandatangani antara pemaju atau mana-mana orang lain (lihat perenggan 41).

(5) Defendan-defendan kesembilan, kesepuluh, ke-11, ke-13 dan ke-15 (pengurus-pengurus bank) bukan pihak kepada PPJB dan perjanjian-perjanjian skim jaminan pulangan itu. PPJB disempurnakan dan wang di bawah perjanjian-perjanjian pinjaman tersebut dibayar kepada defendan pertama. Disebabkan plaintif-plaintif kini cuba membatalkan kontrak-kontrak dengan bank-bank dan memohon remedi ekuiti, plaintif-plaintif hendaklah melakukan ekuiti dengan memulangkan faedah-faedah yang telah diterima di bawah perjanjian-perjanjian pinjaman itu. Plaintif-plaintif tidak menunjukkan perkara ini dalam afidafit atau pliding mereka. Oleh itu, tuntutan plaintif-plaintif terhadap defendan-defendan ini jelas sekali tidak dapat dipertahankan dan merupakan salah guna proses mahkamah (lihat perenggan 40 & 42).

(6) Defendan ke-20 menyediakan kemudahan kewangan hanya kepada plaintif ketiga daripada 178 plaintif. Plaintif-plaintif lain tidak berurusan dengan defendan ke-20 dan ia tidak mengendors projek tersebut. Oleh itu, plaintif-plaintif tidak mempunyai kausa tindakan wajar terhadap defendan ke-20. Hanya disebabkan defendan ke-20 telah memfailkan tuntutan balas memohon relief perisytiharan tidak memberikan plaintif-plaintif kausa tindakan terhadap defendan ke-20 (lihat perenggan 44).

(7) Terdapat beberapa pembiaya bagi projek tersebut tetapi tidak kesemuanya mengendors projek tersebut. Hujah-hujah plaintif-plaintif bahawa bank-bank yang mengendors merupakan ejen-ejen atau berpakat dengan defendan-defendan kelima hingga keenam dalam satu konspirasi untuk merugikan plaintif-plaintif tidak benar. Pengendorsan projek tersebut oleh bank-bank yang mengendorskan tidak menjadikan

bank-bank tersebut terlibat dalam konspirasi yang didakwa untuk merugikan plaintif-plaintif (lihat perenggan 47).]

Notes

For cases on absolute assignment, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2504–2511.

For cases on banker and customer generally, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2085–2184.

For cases on capacity to sue, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 45–49.

For cases on striking out generally, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7425–7635.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 2 AMR 1969, SC (refd)

Boey Oi Leng v Trans Resources Corporation Sdn Bhd [2001] MLJU 566; [2002] 1 CLJ 405, HC (refd)

Chang Yun Tai & Ors v Dataran Mantin Sdn Bhd & Ors [2008] 5 MLJ 295; [2008] 8 CLJ 762, HC (refd)

Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 2) [2005] 5 MLJ 539; [2005] 3 CLJ 493, HC (refd)

Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors [2003] MLJU 7; [2003] 1 CLJ 767, HC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners) [1996] 2 MLJ 431, HC (refd)

Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Anor [1999] 3 MLJ 481; [1999] 3 CLJ 143, CA (refd)

Lonrho plc v Fayed and others [1991] 3 All ER 303, HL (refd)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268, FC (refd)

Parallel Media Group Plc & Anor v Asia PGA Bhd & Ors [2004] 6 MLJ 37, HC (refd)

Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513, FC (refd)

Suruhanjaya Syarikat Malaysia v NV Multi Corp Bhd & Ors [2008] 5 MLJ 61, CA (refd)

Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)

Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & Teh Hong Jet [2007] 1 MLJ 163; [2006] 7 CLJ 541, HC (refd)

Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Companies Act 1965 ss 84, 89, Part IV, Division 5
Contracts Act 1950 ss 24(b), 65
Housing Development (Control and Licensing) Act 1966 ss 16A, 22C
Local Government Act 1976
Power of Attorney Act 1949
Rules of High Court 1980 O 18 r 19, O 18 r 19(1)(a), (b)

M Lavendran (Ngeow & Tan) for the plaintiffs.
Aruna (Kumar & Partnership) for the second and sixth defendants.
Fong Lee Wee (Thangaraj & Assoc) for the fifth defendant.
Fauziah Mustaffa (Abdul Rahman Saad) for the ninth defendant.
John Wong (Azim, Tunku Farik & Wong) for the tenth and 11th defendants.
Rabindra S Nathan (Allister Tan with him) (Shearn Delamore & Co) for the 19th and 21st defendants.
R Tharmy (Manjit Singh Sachdev, Mohammad Radzi & Partners) for the 20th defendant.

Abdul Aziz Abdul Rahim J:

[1] All the 178 plaintiffs alleged they were defrauded by the first to the sixth defendants. The first defendant is the developer who developed the project known as Bandar University Teknoloji Legenda ('the project') through a scheme effected by the first defendant. It was alleged that the plaintiffs were induced, through fraudulent representations made by first defendant and other associated companies of the first defendant, to purchase apartments ('the properties') in the project. The representation alleged by the plaintiffs is that the properties would generate a guaranteed returns of 8%pa for a period of 15 years derived from rentals generated by tenancies from immediate student population of the project once the project is completed.

[2] The plaintiffs also contend that the first defendant and the associated companies are one and the same being the alter egos of the second and the sixth defendants.

[3] The properties were financed by certain financial institutions which have been a party to the proceedings and the plaintiffs alleged that these financial institutions have allowed themselves to be represented as endorsing the project and have provided end financing to the plaintiffs to purchase the properties in the project. However, not all the financial institutions named as party in the proceedings have endorsed the project though they provide end financing for the purchasers of the properties including the plaintiffs.

[4] The properties were developed on land belonging to the seventh defendant who is the local authority under a power of attorney given by the seventh defendant to the first defendant and for the project to be developed on a joint venture basis under a joint venture agreement between the first defendant and the seventh defendant. The plaintiffs contend that the power of attorney did not comply with the requirements of the Power of Attorney Act 1949 and that the granting of the power of attorney was ultra vires the powers of the seventh defendant under the Local Government Act 1976.

[5] The plaintiffs also contend that guarantee returns scheme devised by the first defendant and managed by the fourth defendant is also an inducement by first defendant for the plaintiffs to purchase the properties. It was contended the guarantee returns scheme an investment contract within the meaning of s 84 of the Companies Act 1965 and as such fell within the definition of 'interest' in the said section. Therefore the plaintiffs contend that the guarantee returns scheme was caught by s 89 of the Companies Act 1965. Thus it was contended that the first defendant must comply with Part IV, Division 5 of the Companies Act 1965. The plaintiffs submitted that first defendant have not complied with those requirements; the first defendant is not a public company as required by s 89 read with s 84 and there was no approved deed or prospectus in respect of the guarantee returns scheme. Therefore the plaintiffs say there were contravention of Part IV, Division 5 of the Companies Act 1965 and as such the guarantee returns scheme is an illegal scheme: *Suruhanjaya Syarikat Malaysia v NV Multi Corp Bhd & Ors* [2008] 5 MLJ 61.

[6] The plaintiffs also contend that the guarantee returns scheme is a collateral contract to the sale and purchase agreement.

[7] Premised on the above the plaintiffs argued that sale and purchase agreements were illegal and/or void in law under ss 24(b) and 65 of the Contracts Act 1950.

[8] Citing *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners)* [1996] 2 MLJ 431, the plaintiffs argued that a financier in this case could not provide finance for illegal businesses; and if the financier did so, the financier is aiding and abetting the wrong doing.

[9] The locus classicus of the principles for striking out writ or statement of claim is *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 2 AMR 1969. In that case it was held by the then Supreme Court that summary procedure under O 18 r 19 of the RHC 1980 may be granted only in plain and obvious cases where the claims are 'obviously unsustainable'. It is also a settled law that a weak and unlikely to succeed case

is not a ground to strike out. If the plaintiffs can show some cause of action or some question fit for further investigation at the trial then the striking out should be refused.

[10] Also to be considered in this instant case is the argument by the plaintiffs that in this claim the plaintiffs are also seeking declaratory relief; and therefore on the principles decided in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177, with regards to the issue of the plaintiffs' locus standi, the court needs to be satisfied only as to the fact that the plaintiffs are aggrieved and have a real interest in seeking the declaratory relief and that it is not necessary for the plaintiffs to show they have a present cause of action.

[11] Having stated the plaintiffs' claim and arguments in brief I will now deal with each of the applications. But before I do that I want to emphasise that counsel for the plaintiffs in his written submission (at p 16) states that the plaintiffs are not seeking to enforce the sale and purchase agreements or the rights contained in them. The plaintiffs' complaint is that they were induced into entering the sale and purchase agreements and the contraventions of law rendered the sale and purchase agreements and the associated scheme (guarantee returns scheme) including end financing agreements void. The plaintiffs says these complaints are directed at the first to the sixth defendants being parties who made the fraudulent misrepresentations (in concert or in conspiracy) along with the end financiers whose legal instrument are allegedly to be void for contraventions of law.

ENCLOSURE 80

[12] First I will deal with the application in encl 80 which is the application by the second and the sixth defendants to strike out the plaintiffs' claim. This application is premised on O 18 r 19(1)(b) which is that the claim is scandalous, frivolous or vexatious.

[13] The first defendant is the developer of the project and the second and the sixth defendants are the directors of the first defendant. The basis for the second and the sixth defendants' application to strike out the plaintiffs' claim is predicated on the fact that the plaintiffs have assigned their sale and purchase agreements and other associated contracts in the project to the financiers and therefore by virtue of the assignments the plaintiffs do not have the locus standi to commence the claims herein unless the assignees are made party to the proceedings or the plaintiffs obtain the consent of the respective assignees or they obtained a limited deed of re-assignment for the purpose of this proceedings. The second and the sixth defendants relied on *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 which is a Federal Court decision and which applied another earlier Federal Court

decision in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 for the proposition. In both cases the Federal Court dealt with s 4(3) of the Civil Law Act 1956; and in both cases the court ruled that in cases of absolute assignment under the section, where the assignor passes and transfer, under an assignment, the legal right to the debt or chose in action to which the assignor would be entitled to claim or receive, the action must be brought in the name of the assignee.

[14] In this case there is no serious dispute that the plaintiffs have assigned all their rights under the sale and purchase agreements to the respective financier in a standard form of assignment and that the assignment is an absolute assignment. From the reading of the assignment it is clear that the assignee may dispose the property and deal with it in the event of default by the assignor ie the plaintiffs as if the assignee was the absolute owner of the property. It is also an uncontroverted fact that the plaintiffs have neither made the assignees a party to the proceedings nor have obtained their consent to commence this proceedings.

[15] However the state of the law as stated in *Phileoallied Bank* and *Nouvau Mont Dor (M) Sdn Bhd* above have changed. The change is caused by amendment to the Housing Development (Control and Licensing) Act 1966 which introduced a new s 22C. Under the new s 22C, a homebuyer, as the plaintiffs are in this case, shall be entitled on his own volition and his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceedings against a housing developer or any other person in respect of any matter arising out of the sale and purchase agreement entered into between the homebuyer and the housing developer, notwithstanding anything contained in any written law or any rule of law, agreement, assignment or charge lawfully entered into between a homebuyer as defined in s 16A of the Act and his financier. And s 32(2) of the Housing Development (Control and Licensing) (Amendment) Act 2002, which introduces the new s 22C provides that every agreement, assignment or charge lawfully entered into between a purchaser and his financier before the appointed date shall be subject to, and the parties thereto shall be entitled to the benefits of the new s 22C.

[16] It is obvious therefore the amendment was for the purpose of protecting homebuyers and to provide them with the legal rights to sue the developer directly without having to make an assignee a party or to obtain their consent to sue the developer under the sale and purchase agreement which has been assigned to a financier. The amendment was in 2002; and the action was filed in 2005. The plaintiffs therefore can avail themselves to the benefits of the new s 22C. On this ground alone I think the plaintiffs here have the locus to commence this action against the second and the sixth defendants.

[17] Further, it is to be observed that the new s 22C speaks of agreement, assignment or charge lawfully entered between a homebuyer and his financier. The plaintiffs here have grounded their claim, inter alia, on the allegation that the sale and purchase agreements and the guarantee returns scheme agreements were illegal and unlawful for being in contravention of certain provisions of the Companies Act 1965. The issue as to the legality of the agreements is definitely an issue to be tried. Therefore in my view, the plaintiffs' action against the second and the sixth defendants is not scandalous, frivolous or vexatious. Accordingly I shall dismiss encl 80 with costs.

ENCLOSURE 78 ('D4')

[18] The plaintiffs' cause of action against the fourth defendant is grounded on the tort of conspiracy to injure. This is in relation to the guarantee returns scheme as an inducement for the plaintiffs to enter into a sale and purchase agreement with the first defendant. The plaintiffs contend that the fourth defendant in actuating, or as mechanism for, the representations made by the first defendant regarding assured rentals, have induced the plaintiffs to enter into guarantee returns scheme with the first defendant. The plaintiffs alleged that the fourth defendant had acted in complicity with the first in procuring the execution of the guarantee returns scheme agreements. The plaintiffs have pleaded the particulars of the representation as to the allegation of tort of conspiracy in paras 15–19 of their statement of claim.

[19] It is the contention of the plaintiffs that the guarantee returns scheme was offered as inducement for the sale and purchase agreement and was an integral part of the sale of the property. Further it was contended that the guarantee returns scheme was an investment contract within the meaning of s 84 of the Companies Act 1965 and as such falls within the definition of 'interest' under the same section; and therefore caught by s 89 of the Companies Act 1965.

[20] For the fourth defendant it was submitted that mere allegation being used as conduit or mechanism for the first defendant to perpetrate the alleged conspiracy does not infect the fourth defendant with the tort of conspiracy. It also cannot be presumed without any allegations or particularisations of the fourth defendant's conduct that the fourth defendant was related to all the matters that were pleaded in paras 15–19 of the plaintiffs' statement of claim. The fourth defendant submits that there is no allegation of the fourth defendant's involvement in the fundamental aspect of the alleged conspiracy as pleaded in those paragraphs. Citing *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 at p 679, learned counsel for the fourth defendant submits that 'the court only assumes the truth of the primary facts alleged but is not required to assume as true the applicant's

inferences from those facts, unless those inferences necessarily follow; nor is the court obliged to accept the conclusions alleged or the relief sought, unless the factual basis for those conclusions or relief have been pleaded'. A

[21] The fourth defendant has grounded its application on para (a) of O 18 r 19(1) of the RHC 1980 that the plaintiffs' statement of claim discloses no cause of action against the fourth defendant. It is trite law that when considering a striking out application under that paragraph the court is refrained from looking at any affidavit evidence (and none was proffered in this instant) to see whether there is or there is not a cause of action by the plaintiffs against the defendants. The court will only look at the four corners of the pleadings and on the face of it decides whether it discloses any cause of action. This legal principle is so basic that it requires no authorities (of which there are plenty) to be cited to support it. B C D

[22] Applying the above principle to the pleadings by the plaintiffs in this case, it is to be noted that besides the particulars pleaded in paras 15–19 of the statement of claim, the plaintiffs also pleaded in para 20.3 of the statement of claim that in procuring the execution of the guarantee returns scheme agreements by the plaintiffs, the first defendant had acted in complicity with the fourth defendant and that the second defendant had played an integral role by representing that the termination provision contained in the guarantee returns scheme agreements was intended to apply only to force majeure situations and that in any event the first and/or fourth defendants would honour the obligation set out under the guarantee returns scheme agreements fully. The plaintiffs also pleaded in para 23.7 that payments under the guarantee returns scheme were made arbitrarily by the fourth defendant; and in most instances the payments were not made promptly but were delayed by months. It was also pleaded that at the time of filing of the writ, outstanding payments remain due for certain the plaintiffs and that in some instances no payments have been made at all. It was further pleaded that in other instances the guarantee returns scheme was terminated summarily and in bad faith. E F G

[23] It was submitted by learned counsel for the plaintiffs that the guarantee returns scheme was a scheme provided for by fourth defendant (who is fully owned by Kolej Legenda Sdn Bhd of which the sixth defendant is a director). It is also a fact that the sale and purchase agreement and the guarantee returns scheme agreement were signed at the same time. It is also apparent in exh CCW1, the affidavit in reply by the fifth defendant, the fourth defendant was appointed as the 'manager' of the guarantee returns scheme. H I

[24] Having regard to this submissions and the facts pleaded my view is that the issue whether the guarantee returns scheme is a collateral contract to the sale and purchase agreement and whether it is represented as an inducement to

the plaintiffs to enter into the sale and purchase agreement with the first defendant and whether the fourth defendant was in collusion with the first defendant in orchestrating the inducement having regard to the fourth defendant interest in the guarantee returns scheme are triable issues.

[25] I have stated earlier that the summary procedure for striking out is only applicable in the most obvious and plain cases and in one which the action is clearly unsustainable. Having regard to the circumstances I alluded to the above I do not think that contention by the fourth defendant as to its non-involvement in the complicity surrounding the guarantee returns scheme is obvious and plain. On this ground I shall dismiss encl 78 with costs.

ENCLOSURE 85 ('D7')

[26] I shall also dismiss encl 85 with costs. The main ground for the application by the seventh defendant to strike out the plaintiffs' claim is that the plaintiffs have no locus standi. I do not agree. The plaintiffs have in their statement of claim challenge the authority of the seventh defendant to create the power of attorney in favour of the first defendant giving the latter the right to develop the project on the land belonging the seventh defendant. One the basis of the plaintiffs' argument as the illegality of the sales and purchase agreement is that the seventh defendant has no authority to grant the power of attorney and that in this case the seventh defendant had done so in contravention of the provisions in the Local Government Act 1976 which govern the seventh defendant. In my view, the issue as to whether the seventh defendant has the authority to make the power of attorney in favour of the first defendant should be investigated further at the trial.

ENCLOSURE 64 ('D5')

[27] This is the fifth defendant's application to strike out the plaintiffs' statement of claim and the action. The application is premised on three grounds. Firstly, the statement of claim discloses no reasonable cause of action. Secondly, it is scandalous, frivolous or vexatious or embarrassing and thirdly, it is an abuse of the process of the court.

[28] The plaintiffs have pleaded in paras 8, 11, 20.5, 41, 43 and 49 of the statement of claim as to the fifth defendant's involvement in the project. On the pleaded facts, the plaintiffs argued that Home Network Agreement is premised on the legality and validity of the joint venture agreement, the sale and purchase agreement for the relevant property and the guarantee returns scheme. Therefore it was submitted the Home Network Agreement is not a distinct and independent agreement from joint venture agreement, the sale and purchase agreement and the guarantee returns scheme as claimed by the fifth

defendant. It was further submitted that this is so because the first defendant owned 75% of the fifth defendant and the second and the sixth defendant were at the material times directors of the fifth defendant. It was also argued that under the Home Network Agreement the fourth defendant was to be given irrevocable instructions to make deductions from the guarantee returns and pay directly to the fifth defendant until the installation costs of the Home Network Agreement is fully paid and satisfied. Further plaintiffs submitted that the consent to guarantee returns scheme instruction was also made on the same date as the Home Network Agreement and signed by the representative of the fourth defendant as seen in exh CCW1 Cheng Chee Woon's affidavit affirmed on 23 May 2006. Thus it was submitted that the fifth defendant is also in complicity of the conspiracy to injure the plaintiffs.

[29] For the fifth defendant it was submitted that out of 178 plaintiffs only 24 plaintiffs entered into a Home Network Agreement with the fifth defendant. These are the second, third, fourth, fifth, 42nd, 56th, 68th, 69th, 82nd, 87th, 88th, 90th, 94th, 104th, 110th, 152nd, 156th, 161st, 162nd, 165th, 167th and 168th plaintiffs. Under the Home Network Agreement the fifth defendant installs a home network in the unit of the property purchased by the plaintiffs under the agreement to enable the purchaser of the unit to access and to use the services provided by the fifth defendant subject to payment of fees and charges to the fifth defendant on terms and conditions as contained in the Home Network Agreement.

[30] On the facts pleaded I am of the view that plaintiffs' claim against the fifth defendant discloses no reasonable cause of action. First of all not all plaintiffs have entered into Home Network Agreement with fifth defendant. Except for the 24 plaintiffs who have signed the Home Network Agreement the rest of the plaintiffs are busybodies. In *Parallel Media Group Plc & Anor v Asia PGA Bhd & Ors* [2004] 6 MLJ 37 at p 46 it was held that it is imperative that the plaintiffs must be aggrieved persons and not mere busybodies. On the facts pleaded with respect to the fifth defendant obviously the rest of the plaintiffs with the exception of the 24 plaintiffs mentioned are busybodies and not aggrieved persons.

[31] The mere fact that the fifth defendant is an associate company of the first defendant with the later owning 75% of the fifth defendant and the third and the sixth defendants are shareholders of the fifth defendant is insufficient to give rise to tort of conspiracy to injure. It is to be noted that the project was launched in late 1999 and the fifth defendant written submission incorporated only in mid 2000. To establish a tort of conspiracy to injure against the fifth defendant it seems that the plaintiffs must demonstrate in the pleadings or the affidavits in opposition of the application to strike the pleadings, the fifth defendant intention to harm the plaintiffs: *Dato' Seri S Samy Vellu v Penerbitan*

Sahabat (M) Sdn Bhd & Ors (No 2) [2005] 5 MLJ 539; [2005] 3 CLJ 493; *Lonrho plc v Fayed and others* [1991] 3 All ER 303 at p 310. There was no such intention shown on the pleadings or in the affidavits. Further, the plaintiffs have not shown any agreement between the fifth defendant and the first to the fourth defendants and the sixth and the seventh defendants to an unlawful act and an intention to injure the plaintiffs.

[32] Ownership of the fifth defendant by the first defendant also does not imply that there is conspiracy between the first and the fifth defendants to injure the plaintiffs. It is trite that a company and its shareholders are two different entity: *Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Anor* [1999] 3 MLJ 481; [1999] 3 CLJ 143 at p 148.

[33] Another factor to consider is that the representation made by the fifth defendant that home network installation may enhance the value of the property purchased by the plaintiffs does not tantamount to intention by the fifth defendant to injure the plaintiffs. At most the representation is only an invitation to treat. The plaintiffs were always at liberty to refuse to enter into the Home Network Agreement with the fifth defendant as indicated by the fact that only 24 out of 178 plaintiffs who have signed the Home Network Agreement.

[34] On the argument that the fifth defendant has unjustly enriched itself through the Home Network Agreement signed by the 24 plaintiffs, it is my view that this argument is untenable. The 24 plaintiffs have not disputed or denied that the fifth defendant has fulfilled their obligation under the Home Network Agreement signed by them and therefore the payments received by the fifth defendant were justified under the agreements for the services rendered. There is no allegation that the fees and charges charged under the Home Network Agreement were exorbitant or for services not rendered by the fifth defendant.

[35] Accordingly, I allowed the application by fifth defendant in encl 64 with cost.

ENCLOSURES 148 ('D9'), 128 ('D10'), 112 ('D11'), 155 ('D13') AND 76 ('D15')

[36] I will deal with the above five applications together. The issues and the grounds involved are substantially the same. Enclosure 148 is application by the ninth defendant to strike the plaintiffs' statement of claim and the action

on the ground that it being scandalous, frivolous and vexatious. Likewise are the applications in encls 128, 112 and 76 by the tenth, the 11th and the 15th defendants respectively.

[37] All five defendants ie the ninth, tenth, 11th and 15th are end financiers who provided financing to the respective plaintiffs to purchase the property in the project. All five defendants grounded their applications on paras (b), (c) and (d) to be read disjunctively.

[38] The crux of the plaintiffs' claim against the five defendants is found in paras 30–32 of the plaintiffs' statement of claim and this revolves around the validity of the power of attorney given by the seventh defendant to the first defendant, the legality of the guarantee returns scheme and the financial arrangement stemming from it. It is the argument by the plaintiffs that the sale and purchase agreements were illegal or void and as a result thereof end financing for the sale and purchase agreement were also void under s 24(b) of the Contracts Act 1950. The rational advanced by the plaintiffs for this conclusion is that the five defendants 'had facilitated or otherwise aided and abetted in the illegal transactions'.

[39] In *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & Teh Hong Jet* [2007] 1 MLJ 163; [2006] 7 CLJ 541 at p 547 the court said that 'scandalous' means wholly unnecessary or irrelevant while 'frivolous and vexatious' means obviously unsustainable. In support of this view the court in that case referred to two earlier decisions in *Boey Oi Leng v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2002] 1 CLJ 405 and *Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors* [2003] MLJU 7; [2003] 1 CLJ 767.

[40] It is a fact that all the five defendants were not privy to the sale and purchase agreements and the guarantee returns scheme agreements. However in his submissions learned counsel for the plaintiffs argued that is not the answer for the five defendants to be struck off. He further argued that the five defendants cannot seek to take a benefit from an illegal transaction and the fact that the five defendants may or may not be ignorant of the illegality is irrelevant.

[41] At this juncture, I must refer to the decision in *Chang Yun Tai & Ors v Dataran Mantin Sdn Bhd & Ors* [2008] 5 MLJ 295; [2008] 8 CLJ 762. There the court was dealing with the same argument by the 30th, 54th, 134th, 160th, 161st, 162nd, 164th to 168th and 177th to 178th plaintiffs in an against the decision of the deputy registrar allowing the application of the 14th, 17th and 18th defendants to strike out the plaintiffs' action on account that there is no reasonable cause of action under O 18 r 19(1)(a) of the RHC 1980. In that case the court found that in essence the plaintiffs were seeking to declare the sale and

purchase agreements which they have individually entered with developer ie the first defendant void because of contravention of the provisions in the Local Government Act 1976 by the seventh defendant in creating the power of attorney in favour of the first defendant to undertake the project on a piece of land belonging to the seventh defendant; that is the same basis on which the plaintiffs seek remedy against the five defendants in respect of encls 76,112,128 and 178 here. Having scrutinised the pleadings and having considered the submissions by counsels, the learned judge in *Chang Yun Tai & Ors* expressed the view that the relationship between the plaintiffs and the banks is purely commercial in nature strictly on a quid pro quo basis that the monies were lent to be repaid in accordance with the terms and conditions of the loans agreements. The court in that case went further to say that the banks as loan provider should not be concerned with the propriety or legality of any contracts entered into between the seventh defendant, the developer, or any other persons leading to the acquisition and development of the land on which the project was built. More importantly the court said that 'it is clearly repugnant to good reason and common sense to find a cause of action based purely on the assertion that the bank were expected to know of those alleged irregularities and should therefore be stopped from enforcing their rights under the loan agreements'.

[42] I agree entirely with the views expressed by the learned judge in *Chang Yun Tai & Ors* on the same point raised in these five applications. Further it is to be noted that the sale and purchase agreements have been completed and the monies under the loan agreements have been disbursed to the first defendant by the applicants' bank herein, a fact which is not deniable by the plaintiffs. However the plaintiffs now seek to avoid the loan agreements and to deny the applicants' banks from asserting their rights under the agreement. In other words the plaintiffs here are trying to rescind the contracts with the banks that have provided them with financing to purchase the property. The plaintiffs are seeking an equitable remedy; and to be entitled to such remedy the plaintiffs themselves must do equity. That is to say the plaintiffs must refund or return or be ready to refund or return all the benefits which they had received under the loan agreements. This the plaintiffs have not shown either in their affidavits or in their pleadings. Therefore it is my opinion that the plaintiffs' claim is obviously unsustainable against the defendants in encls 76, 112, 128, 148 and 155. And that such claim is clearly an abuse of the court process. Accordingly, I shall allow the applications in those enclosures with costs.

ENCLOSURE 73 ('D20')

[43] For the same reasons that I gave in allowing the application in encls 76, 112, 128, 148 and 155, I would also allow the application by the 20th defendant in encl 73 to strike out the plaintiffs' statement of claim and the

action. In addition I would say this: on the facts it is obvious that the 20th defendant provided financing only to three of the 178 plaintiffs namely the 119th, 143rd and the 169th plaintiffs. The rest of the plaintiffs have no dealing with 20th defendant and the 20th defendant also did not endorse the project. The 20th defendant also has disbursed the monies under the respective loan agreement to the first defendant for and on behalf of the three named plaintiffs. Clearly therefore on the face of the pleadings the plaintiffs have no reasonable cause of action against the 20th defendant and the action against the 20th defendant is an abuse of court process.

[44] Learned counsel for the plaintiffs has, in his written submissions, argued that the plaintiffs have a sustainable action against the 20th defendant because the latter has also filed a counterclaim against the 119th, 143rd and 169th plaintiffs for a declaration that the security documents entered between them are valid and binding. I cannot accept this argument. Just because the 20th defendant has filed the counterclaim and seeking a declaratory relief, which the plaintiffs contend indirectly shows that the 20th defendant is uncertain of the validity of its own agreements, I do not think it can be imputed that the plaintiffs have caused of action against the 20th defendant. To me the action taken by the 20th defendant is more on the side of caution and in response to the plaintiffs attempt to have the same agreement being declared null and void.

ENCLOSURE 146 ('D19') — OPPOSING THE 30TH PLAINTIFF'S APPEAL AGAINST SENIOR ASSISTANT REGISTRAR STRIKING OUT

ENCLOSURE 147 ('D21') — OPPOSING THE 12TH PLAINTIFF'S APPEAL AGAINST SENIOR ASSISTANT REGISTRAR STRIKING OUT

[45] Enclosures 146 and 147 are concern with the 20th and 12th plaintiffs' appeal respectively against the senior assistant registrar decision allowing the 19th and 21st defendant's application to strike the plaintiffs' statement of claim and the action against the two defendants. The basis of the plaintiffs' appeal in these two enclosures is again the purported illegality of the sale and purchase agreements and the guarantee returns scheme and the declaratory relief sought by the plaintiffs in respect of the sale and purchase agreement and the guarantee returns scheme.

[46] With regard to these two appeals the following facts are to be noted. The contract between the 30th plaintiff and the 19th defendant and the 21st defendant and the 12th plaintiff has since been discharged by due performance. The amounts outstanding were fully settled without any protest by the 12th and the 30th plaintiffs. Therefore the 19th and the 21st defendants argued that there been accord and satisfaction and a release of the 19th and the

21st defendants and there was no reservation of rights whatsoever by the 30th and the 12th plaintiffs. The 19th and the 21st defendants also were not privy to the sale and purchase agreements or the guarantee returns scheme agreement and they never endorsed the project. Their role is basically as financier who provided financing at the request of the purchasers (the 12th and the 30th plaintiffs herein). I will therefore repeat my earlier views on the issue of illegality of the sale and purchase agreement and the guarantee returns scheme and find that the plaintiffs' appeals in encls 146 and 147 are without merits and accordingly I dismiss them with cost to the respondents/19th and 21st defendants.

[47] Finally I would like to say something on the issue regarding the endorsement of the project by the end financier. There are several end financiers for the project. But not all the end financiers endorsed the project. Only the eighth to 11th defendants, the 13th and the 12th defendants endorsed the project and they have been referred to as the endorsement banks. What is meant by endorsing the project here in my opinion is that the project is being presented as being one which has the financial support of the endorsing banks. It is the plaintiffs' arguments that endorsing banks are agents or in collusion with the first to sixth in a conspiracy to injure the plaintiffs. This cannot be true. The endorsement of the project by the endorsing banks does not make the banks a complicity in the purported conspiracy to injure the plaintiffs. The endorsement appears to me as nothing more than the expression of the endorsing banks financial assessment of the value and potential of the projects as to its viability. It does not in any way amount to misrepresentation by the endorsing bank that they guarantee the returns on the investment as promised by the first to sixth defendants under the guarantee returns scheme. It also does not in any way indicative of the banks endorsement of the guarantee returns scheme devised by the first defendant. In any case I would say that it is for each and every plaintiff to make the crucial decision whether or not to invest in the properties by purchasing them either on long term or short term basis; and each of the plaintiffs has no one to blame if the investment turns sour except itself. Each of the plaintiffs ought to have realised at the point of making the purchase of the property that every investment carries with it certain risks.

ENCLOSURE 62 ('D1')

[48] With regards to encl 62, which is the application by the first defendant, the application was not heard because provisional liquidator has been appointed for the first defendant and counsel for the first defendant did not receive any instruction from the provisional liquidator for the first defendant to proceed with the application.

[49] So I made no order on encl 62.

Applications allowed in part.

Reported by Kanesh Sundrum